

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3680
FACSIMILE: 803-253-6283

March 30, 1990

The Honorable David E. Landholt
Chairman
State Board of Social Services
P. O. Box 1520
Columbia, South Carolina 29202-1520

Dear Mr. Chairman:

You have asked, on the part of the State Board of Social Services, what are the statutory duties and responsibilities the Board maintains with respect to litigation involving the Department of Social Services. In your request letter you suggest that there is one category of litigation that includes program litigation involving the Department of Social Services that occurs in the ordinary course as a part of the operation of the Department's programs and that there is a second category of litigation presumably that does not customarily occur as a consequence of the ordinary operations of the Department's programs. This latter category, you suggest, includes litigation involving matters of agency management such as personnel disputes. Your question, as I understand, relates to the statutory duties and responsibilities of the Board with regard to this latter category of litigation.1/

State law does not appear to definitively resolve the Board's role in Department litigation, at least in a general sense. The General Assembly has not expressly directed that this aspect of Department governance be exclusively performed by the Board or the Commissioner or his designee. Thus, apparently, similar to

1. Your inquiry relates to litigation where the Department of Social Services is a named party, as opposed to litigation where the State Board (or its members) are named. Of course, with regard to litigation involving the State Board or its members, the role of the Board and/or its members, respectively, would be most prominent.

The Honorable David E. Landholt
Page 2
March 30, 1990

most other executory functions, the division of governing responsibilities becomes a matter of policy for the Board and the Commissioner. This conclusion is somewhat tentative, first because there is an absence of judicial precedent upon this question and the statutory language lacks precision in this area. Secondly, there is probably no sufficient general response to the question since litigation cannot be singularly categorized except in a very general sense and the role or responsibility of the Board in a given legal dispute could vary, depending upon the discrete management function involved.

STATUTORY LAW

The statutory duties of the Board and the Department are located at South Carolina Code Section 43-1-10, et seq. (1976 as amended). The Department operates under the Board. Section 43-1-10. The Board appoints a commissioner who serves as the chief executive officer of the Board and the administrative head of the Department. Section 43-1-50. The Commissioner must, among other duties, "execute the decisions and carry out the policies of the Board." Id. Other statutory provisions provide specific duties and responsibilities of the Board.^{2/} There are as well statutory provisions that specify certain duties of the Department^{3/} and the Commissioner. See Section 43-1-50 and 43-1-70.

DECISIONAL LAW AND PRIOR OPINIONS

Court decisions and prior opinions of this Office do not address the question presented and, except in one instance, do not

2. See Section 43-1-60 [The Board may create a state advisory council and other committees that the Board may deem necessary for the prudent administration of the Department's programs.]; Section 43-1-70 [The Board approves the appointment and hiring of Department officers and employees and plays a role in fixing their salaries.]; Section 43-1-170 [The Board is to prepare and submit an annual budget for the Department.]; Section 43-1-190 [The Board may select the depositories for its funds.]; and Section 43-1-210 [The Board prepares an annual report.]

3. See Sections 43-1-90 through -150; also Section 43-1-170 [Compensation for employees and officers shall be fixed by the State Department.]; and Section 43-1-180 [Department shall supervise and administer public welfare activities and functions and adopt all necessary rules and regulations and formulate policies and methods of administration to carry out effectively the activities and responsibilities of the Department.]

The Honorable David E. Landholt
Page 3
March 30, 1990

address the role or responsibility of the Board, vis-a-vis, the role or responsibility of the Commissioner or the Department. In Coffin v. South Carolina Department of Social Services, 562 F. Supp. 579 (D.S.C. 1983), the district court characterized the relationship as follows:

The State Department of Social Services (DSS) is a State agency and the Board of DSS is its governing body.

562 F. Supp. at 583. Parenthetically, the court held that at least for the purposes of the federal Age Discrimination in Employment Act [29 U.S.C. § 621, et seq.] both the Board and the Department are statutory "employers" of Department employees.

This Office, in its prior opinions, has generally failed to distinguish the legal mandates of the Department and the Board, apparently implicitly agreeing with the district court's characterization in Coffin that the Board is the governing body of the Department. See, e.g., Op. Atty. Gen., November 26, 1984 ["Powers and duties of the State Board and Department are specified in Section 43-1-80, et seq. and include the formulation of policies such as the disciplinary policy [for Department employees]."] The opinion of this Office dated July 13, 1977, concludes that the employment of general counsel for the Department is vested with the Commissioner, not the Board, and is subject to the approval of the Board, as well as the Attorney General. The opinion relied upon the express language of Section 43-1-70, which vests employment authority with the Commissioner and not the Board.

DISCUSSION

The statutory scheme creating the State Board and the Department envisions that the Board will function as the governing head generally responsible for the governance of the Department. Cf., Coffin v. South Carolina Department of Social Services, supra. Thus, unlike the relationship dynamics among the State Department of Education, the State Superintendent of Education and the State Board of Education (see South Carolina Code Title 59, Chapter 5, and Title 59, Chapter 3) with each maintaining, by law, discrete and defined duties, it appears that the State Board of Social Services and the State Department of Social Services are charged generally with the same public mandate. Although by statute the Board and the Department are separate legal entities, the Board's function is to serve as the governing head of the Department and establish policies for the Department's governance. Sections 43-1-10 and -50. Admittedly, there are some duties vested expressly in the Board (see footnote two) and some vested expressly in the Department (see footnote three). But again, for the most part, the divi-

The Honorable David E. Landholt
Page 4
March 30, 1990

sion of discrete executory and management functions between the Board and the Department is not formally mandated by law; thus, suggesting that the Board and Commissioner enjoy a wide range of discretion in determining the division of ultimate responsibilities.

With regard to the role of the Board in non-recurring litigation that relates generally to agency management or administration, I do not believe that broad policy guidelines for this type of litigation must, by law, be formally promulgated by the Board, as opposed to the Commissioner, since the statutory law does not compel either result. Additionally, I am unable to identify any general rule that would suggest that this category of litigation more clearly annexes to the duties of administration as opposed to those executory duties normally performed by the Board. Accordingly, I believe that the present statutory scheme leaves this matter to the discretion of the Board and the Commissioner who serves as the Board's chief executive officer and is the administrative head of the Department. In this regard, I am advised that the Board has not heretofore established any policies relative to the Department's litigation.

In reaching this general conclusion, I caveat, again, that it is tentative since the relationship between the Board and the Department, particularly with regard to the special roles of each, is not completely clear from the statutes and, further, there is no guidance in prior opinions or judicial precedents. Of course, if the General Assembly so chooses, it may, through legislation, clear up any confusion that lies in this area. Further, I do not suggest that any general litigation policies adopted by the Board could serve to divest other officials of their express official responsibilities.

Finally, any litigation policy adopted by the Board or the Commissioner would be subordinate to the authority of the Attorney General to control the State's litigation. See, 7 Am. Jur. 2d Atty. Gen. § 18; 7A C.J.S. Attorney General § 11; Cooley v. South Carolina Tax Commission, 204 S.C. 10, 28 S.E.2d 445 (1943); South Carolina Code Section 1-7-80. This remains true even though the Department is authorized by the General Assembly to employ its own legal staff. And I caution that regardless of any litigation policy, lawyers representing the State are constrained by Supreme Court rules governing legal practice and, thus, any litigation decisions must conform to these rules. See, e.g., Supreme Court Rule 32 and South Carolina Rules of Civil Procedure 11.

CONCLUSION

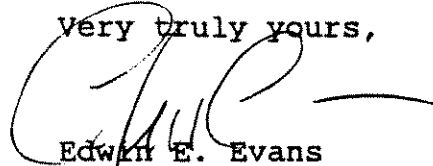
The General Assembly has not mandated, at least in a general sense, that the State Board of Social Services, as opposed to the

The Honorable David E. Landholt
Page 5
March 30, 1990

State Department of Social Services, maintain responsibility for litigation policies that govern Department litigation. Similar to most other executory functions affecting the Department, the role of the Board, vis-a-vis, the Commissioner, is a matter of policy for them to determine.

If I may provide any further advice, please call upon me.

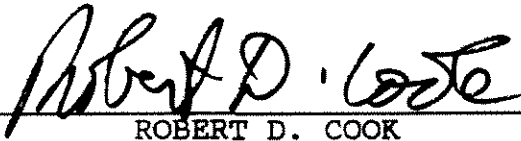
Very truly yours,



Edwin E. Evans
Chief Deputy Attorney General

EEE/shb

REVIEWED AND APPROVED:



ROBERT D. COOK
Executive Assistant for Opinions